

MARSHA L. KELLEY
Claimant

KINEDYNE CORPORATION
Respondent

LIBERTY MUTUAL INSURANCE CO.
Insurance Carrier

ORDER

APPEARANCES

RECORD AND STIPULATIONS

ISSUES

The claimant alleged she suffered a repetitive series of bilateral upper extremity injuries each and every workday commencing June 28, 1999, through her last day at work

for respondent on April 13, 2001. The Administrative Law Judge (ALJ) determined claimant suffered a 5 percent scheduled disability to her right upper extremity.

The claimant requested review and alleges the ALJ erred in the determination of the nature and extent of disability. Claimant argues she suffered bilateral upper extremity injuries and her permanent impairment should be based upon a whole body injury instead of being limited to a scheduled disability to the right upper extremity. Because her employment with respondent was terminated, claimant argues she is entitled to a 95 percent work disability based upon a 100 percent wage loss and 90 percent task loss.

Conversely, respondent argues that the medical evidence establishes claimant's permanent partial impairment caused by this injury is limited to her right upper extremity and consequently the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant had filed a previous workers compensation claim against respondent (Docket No. 233,493) alleging a series of bilateral upper extremity injuries. As a result of those injuries claimant underwent a left cubital tunnel release and lateral epicondylectomy. The ALJ entered an award based upon a 21 percent permanent partial functional impairment to the whole body. On review the Board determined the date of accident was August 17, 1999, but affirmed the ALJ's finding that claimant had suffered bilateral upper extremity injuries which resulted in a functional impairment to the whole body.

As claimant continued working for respondent she testified that she had difficulties with both upper extremities as well as her upper back and shoulders. But the most significant problems were with her right upper extremity which progressively worsened. Claimant received conservative treatment for her right upper extremity. Ultimately, on September 14, 2000, Dr. John B. Moore performed a right cubital tunnel release as well as a lateral epicondylectomy. On February 15, 2001, Dr. Moore performed a right de Quervain's release.

On April 27, 2001, Dr. Moore concluded claimant was at maximum medical improvement and he rated her permanent partial impairment to the right upper extremity at 20 percent. The doctor imposed permanent restrictions against repetitive motion which he defined as greater than 6 repetitions per minute requiring greater than 5 pounds of

pinch or 10 pounds of grip. The restrictions were applicable to claimant's right hand and the doctor noted claimant had no permanent restrictions on the left hand.

After claimant's prior work-related injuries to her bilateral upper extremities the respondent had accommodated the restrictions imposed as a result of those injuries. However, upon receipt of Dr. Moore's permanent restrictions for claimant's right hand, the respondent concluded it could no longer accommodate claimant's restrictions.¹ Consequently, claimant was terminated from employment with respondent on April 13, 2001.

Dr. Robert W. Warner examined the claimant on May 22, 2001, at the request of her attorney. The doctor diagnosed claimant with chronic right lateral epicondylitis, post surgical; chronic right cubital tunnel syndrome, post surgical; and, chronic mild right de Quervain's syndrome, post surgical. The doctor noted claimant should avoid repetitive bending use of the elbows or repetitive gripping and imposed restrictions against overhead activity with a maximum 15 pound occasional lifting or carrying. Using the *AMA Guides*², the doctor concluded claimant had suffered an 18 percent permanent partial impairment to the right upper extremity. The doctor also noted that claimant had a 30 percent permanent partial impairment to her left upper extremity which was unchanged from the rating the doctor had provided for the prior workers compensation claim in Docket No. 233,493. The doctor had also rated claimant's right upper extremity for the prior claim and determined she suffered a 10 percent permanent partial impairment to the right upper extremity.

The ALJ ordered an independent medical examination be performed by Dr. Lynn D. Ketchum. Dr. Ketchum examined claimant on November 20, 2001, and rated her with a 15 percent permanent partial impairment to the right upper extremity and a 25 percent permanent partial impairment to the left upper extremity which he combined for a 23 percent whole person impairment. The doctor recommended claimant follow the restrictions given by Dr. Moore.

The workers compensation act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ "Burden of proof" means the burden of a party to persuade the trier of

¹ R.H. Trans. at 27-28.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

³ K.S.A. 44-501(a).

facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁴

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.⁵ The Act recognizes two different classes of injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent partial general disability.⁶ It is the situs of the disability, not the situs of the trauma, that determines which benefits are available.⁷

In this instance, the claimant returned to work and developed increasing symptoms in her right upper extremity for which she received medical treatment. The treating physician, Dr. Moore, ultimately rated claimant's right upper extremity and further concluded she had suffered no additional impairment to her left upper extremity. Dr. Warner also noted an increase in claimant's impairment to her right upper extremity, but concluded claimant had no increased disability in her left upper extremity nor any other ratable impairment. The court ordered independent medical examiner, Dr. Ketchum, limited claimant's impairment to her upper extremities but adopted Dr. Moore's restrictions which were limited to claimant's right upper extremity. And Dr. Ketchum's impairment rating for claimant's left upper extremity was less than the preexisting impairment ratings she had received in her previous claim in Docket No. 233,493. Based upon the medical evidence, the claimant has only established she suffered an additional impairment to her right upper extremity. Consequently, she is entitled to compensation for a scheduled disability. The Board adopts and affirms the ALJ's Award.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated May 15, 2002, is affirmed.

IT IS SO ORDERED.

⁴ K.S.A. 44-508(g).

⁵ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

⁶ K.S.A. 44-510d; K.S.A. 44-510e.

⁷ *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

Dated this _____ day of August 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Attorney for Claimant
James K. Blickhan, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director